IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

W. H. NEHER,

Petitioner,

vs.

A. E. HARWOOD, as Postmaster of the City of La Verne, California.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

An opinion was filed in the District Court by Judge Leon R. Yankwich in the case of *Acret v. Harwood,* which by reference was made the opinion in this case [R. 4, Appendix A], 41 F. Supp. 492. It would seem that the court in considering a motion to convene a three-judge court in the former case confused the issues in these cases [R. 4].

The opinion of the Circuit Court of Appeals was written by Judge Albert Lee Stephens, and filed on June 5, 1942 [R. 80 and 102] (..... F. (2d) .....).

Comment concerning misconstruction of the facts contained in these opinions appears in the Petition at page 3.

Jurisdiction.

The jurisdiction of this court is shown in the petition at page 4. The lower courts had jurisdiction as follows:

The judgment of the District Court was made and entered October 29, 1941 [R. 63].

Notice of appeal from such judgment and statutory cost bond were filed January 27, 1942 [R. 74]. As established by the complaint [R. 8], the action is one arising under the postal laws. Jurisdiction in the District Court was therefore under 28 U. S. C. A., Sec. 41(6).

Jurisdiction in the Circuit Court of Appeals was under the provisions of 28 U. S. C. A., Sec. 225 (a) and (d).

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In holding that the Postmaster General is an indispensable party.

(2) In taking into consideration the circular referring to a Cosmic Rectifier, where it was not shown that this circular had ever been sent through the mail by petitioner, or any person with his authority, and where its use had been discontinued for a period of three years.

(3) In holding that the complaint does not state facts sufficient to constitute a cause of action.

(4) In ignoring the constitutional questions presented, to-wit: (a) whether an administrative agency can inflict a punishment such as has been inflicted here, and (b) whether it can take a portion of a person's liberty—as distinguished from his property—and inflict such a punishment, in the

manner done here, to-wit, at a hearing held three thousand miles from his place of residence, without the presumption of innocence, the right to a jury trial before an impartial judicial tribunal, and the protection of his other civil rights guaranteed by the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States.

Statement of the Facts.

Respondent at no time questioned that the complaint states facts sufficient to entitle petitioner to relief in some jurisdiction [Appendix B, p. 10].

Since the complaint was dismissed on motion, the allegations of the complaint constitute the facts of the case. From these allegations, which for the purpose of testing the sufficiency of the complaint must be taken as true, it appears:

The post office department notified petitioner by mail at his place of residence at La Verne, California, to show cause at Washington, D. C. on a day stated why a postal fraud order should not be made against him under the provisions of U. S. C., Title 39, Sec. 259, on the ground that petitioner was "THEN" obtaining money by means of fraudulent representations and promises contained in a writing sent through the mail "TO THE EFFECT" that by placing "tuning-in cards" in a so-called COSMIC GENERATOR that he could remove the cause of and cure 97% of every form of disease", and "that the results aforesaid would be accomplished regardless of distance" [R. 15].

In view of the additional expense involved in a hearing held at Washington and in reliance upon the fact that said charges were false and could not be proven, petitioner

did not attend, or employ an attorney to represent him, at such hearing [R. 16]. Petitioner asserts in his complaint that he in fact did not make the representations set forth in said charges, or any misrepresentations whatsoever [R. 16], and no evidence was adduced at such hearing to establish that he ever made such representations "in effect", by innuendo, or under any possible construction [R. 22]. The Postmaster General nevertheless made a perpetual order requiring all of petitioner's mail, personal and otherwise, to be stamped "FRAUDULENT" and returned to the senders [R. 23].

The Findings of Fact of the Postmaster General [attached as Exhibit B to the complaint, R. 38 to 61] establish:

That commencing "in the early part of 1938 * * * remittances were solicited by means of a printed circular * * *" [R. 40]. It appears that this circular, however, has no relation to the writing referred to in the charges [R. 40]. It does not refer to "placing tuning-in cards in a Cosmic Generator". It refers to a machine known as a Cosmic Rectifier shown by the pictures contained in the findings to be a different machine for a different purpose [R. 41 and 53]. There is no finding that it was sent through the mail [R. 40]. It has no relation to the business in which petitioner was then engaged [R. 43].

It is found with relation to this circular that: "After a number of months (after 'the early part of 1938'), the '*use*' of the foregoing circular was discontinued by Neher * * *" [R. 43].

The postal proceedings were not commenced until March 30, 1941 [R. 38], which is nearly three years after the "use" of this circular was discontinued. This is the cir-

cular which is cited and quoted at length in the opinion of the Appellate Court [R. 100] as a justification for the order of the Department holding petitioner guilty of fraudulent use of the mail.

It is the theory of the complaint that these Findings of Facts therefore affirmatively establish that the Post Office Department has attempted to use the highly prejudicial circular concerning a machine known as a Cosmic Rectifier as partial support for its order [R. 41], and since the use of this circular in any manner had been discontinued and since no writing or asserted fraudulent scheme involving this machine or this circular was referred to in the charges [R. 15 and 39], petitioner had no notice or opportunity to be heard concerning it, and for such reason, among others, the order was made without due process of law [R. 29].

It is further the theory of the complaint that in order to meet the requirements of due process the charges of the Postmaster General should have stated the exact words of the writing which it was contended was fraudulent, instead of merely stating his conclusions as to its "effect", and that in view of the fact that the hearing was to be held three thousand miles distant petitioner was especially entitled to be precisely informed as to the charges against him in order that he might be able to judge of the necessity of traveling such a distance to defend himself.

There is also set forth in the findings, in *haec verba*, another writing, which is the only circular which petitioner was then circulating [R. 43 to 50], or had been circulating for nearly three years. The only express representation which this circular contains with reference to the

power to cure is: "Harmonized prayer knows no bounds. Distance means nothing to the power of prayer" [R. 48].

Though the contents of this circular [R. 43 to 50] will undoubtedly seem extremely silly to every member of this court, it contains none of the representations stated in the charges and it would seem that it contains no representations for which this petitioner should be adjudged guilty of fraud and punished by an order for a continuous public branding for life in the manner done here.

The only representations in this circular upon which the Findings of Fact rely in support of the order, and which even remotely resemble the charges made, are segregated and expressly repeated in the Findings at R. 57. In the Findings of Fact, with appropriate emphasis added, it is stated:

> "In the answer of Neher to the charges he states: 'I make no promises or representations to cure anything.' However, it will be noted that in quotations from his recent circular matter, hereinbefore set forth, he states:
>
> Q. Will the Cosmic Forces *set in motion through prayer* cure every form of disease or ailment? A. *If* a Cosmic Field *could be* produced that would be *in perfect harmony with God* that *might be possible.* Under our present setup *perhaps not over* 97 percent *will yield* to General Prayer. About 2 percent will need special prayer which may have to be repeated many times. About one percent will not yield under our present Methods" [R. 57].
>
> "From the foregoing statements it is manifest that as charged in the Memorandum, this promoter is in fact promising to cure 99 percent of 'every form of disease or ailment'" [R. 58].

It is the theory of the complaint that the Findings of Fact therefore affirmatively show the petitioner did not represent or promise that by placing tuning-in cards in a "Cosmic Generator" he could cure 99% of every form of disease, but that he in fact merely represented in substance and "in effect" that *perhaps* 97% of every kind of disease *will yield to prayer,* which does not correspond to the charges, or justify the Findings of Fact, and is obviously no actionable representation at all.

With reference to the charge that petitioner promised *"in effect* that the results aforesaid would be accomplished regardless of distance," the circular in fact states, *in exact words,* in question and answer form, as follows:

> "Q. We understand that you have a Cosmic Generator in your Laboratory that will transmit harmonizing power to people at a distance and thus get all parts of the body back into harmony. Is that true? A. Yes, it is true we have a Cosmic Generator in our Laboratory, but *we make no claims that it will transmit power of any kind to a person at a distance* * * *" [R. 45]. (Emphasis added.)

It is petitioner's theory that he represented in fact directly the opposite of the representations erroneously stated "in effect" in the charges and that the Findings of Fact affirmatively so show.

Petitioner further alleges in his complaint, and for the purpose of the motion to dismiss these allegations also must be taken as true, as follows:

Many persons believe that they are benefited by petitioner's said efforts and service in connection with his said business and they are in fact being benefited by said efforts and service, and none of his customers have ever

been dissatisfied or have ever claimed that his said efforts and service have in any manner been misrepresented to them or that they had wasted the small sum of $1.00 per month which they have paid to the plaintiff. To his knowledge, no persons have ever objected to his manner of operation of said business, except the California State Medical Board which was responsible for the commencement of said proceedings. Petitioner's said enterprise is legal and legitimate and is conducted in accordance with high ethical and moral standards, and is founded on the belief that God will help those who demonstrate their faith in Him and on the proposition that the mind of the human race is largely responsible for its ills and is a perceptible factor in treating, curing, benefiting and remedying said ills and that the power of prayer and of mental healing, otherwise known as auto suggestion, together with the use of said cosmic generator, is helpful to the human health, all as stated in and as limited by the statements contained in the aforesaid circular [R. 31].

It is the theory of the complaint that the postal order is void and made beyond statutory authority because it was made without evidence to support it [R. 17 and 31], and that for such reason and because of its provisions and the manner in which it was made [R. 8 to 12], its execution constitutes a taking of petitioner's liberty and property without due process of law in violation of his constitutional rights under the 4th, 5th, 6th, and 8th Amendments [R. 8].

In short, it is the theory of the complaint that upon such a record, and under the Constitution of the United States, the Post Office Department has no jurisdiction to find petitioner guilty of fraud or to condemn him to be publicly and continuously branded for life, or for so long as the department may arbitrarily choose, or at all.

ARGUMENT.

POINT I.

The Postmaster General Is Not an Indispensable Party Where One Seeks to Enjoin the Affirmative Acts of a Local Postmaster in Marking One's Mail "Fraudulent" and Returning it to the Senders Under Color of an Order Made Beyond Authority.

(a) This Question Should be Reviewed by This Court Because the Decision of the Appellate Court Is in Conflict With Rood v. Goodman and Other Appellate Court Decisions and Apparently With Decisions of This Court.

In *Rood v. Goodman, supra*, the court states as follows:

> "There have been some civil suits over fraud orders brought against the Postmaster General, but most of the suits of that kind have been brought and maintained against the local postmaster. American School of Magnetic Healing v. McAnnulty, *supra*; Leach v. Carlile, 258 U. S. 138, 42 S. Ct. 227, 66 L. Ed. 511; Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct. 789, 48 L. Ed. 1092; and in the inferior courts, Enterprise Mfg. Ass'n v. Zumstein (C. C. A.) 67 F. 1000, 1002; Crane v. Nichols (D. C.), 1 F. (2d) 33; Aycock v. O'Brien [C. C. A. Ninth], 28 F. (2d) 817; and other cases without number. It is only recently, and in only two District Court cases, that it has been claimed that the Postmaster General is an indispensable party to such a suit. In one of these, Wheeler v. Farley [D. C. Cal. S. D.], 7 F. Supp. 333, the proposition was sustained; in the other Bailey, Gaunce Oil & Ref. Co. v. Duncan (D. C.), 10 F. Supp. 280, it was denied."

The opinion herein is also in conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Moore v. Anderson,* 68 Fed. (2d) 191, and apparently with the decision of this court in *Colorado v. Toll, supra,* in which the Circuit Court, in referring to and quoting from *Colorado v. Toll,* says:

> "As stated in the opinion, at page 230 of 268 U. S., 45 S. Ct. 505, 506, 69 L. Ed. 927: 'The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do * * * and that derogate from the *quasi*-sovereign authority of the State. *There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States.*" (Cases cited.)
>
> "In thus stating the rule, the Supreme Court used the word 'authority' as it had been used in the beginning of the opinion; that is, '*beyond the authority conferred by the acts of Congress.*'" (Emphasis added.)

It would appear that the words "that derogate from the *quasi*-sovereign authority of the state" are not controlling of the opinion. A common citizen has the same right to protection in the district of his residence against unauthorized acts of a government official as has a state. He has much greater need of it. A state can afford to prosecute a suit against the government at Washington, D. C., through its attorney general, while probably not one citizen in one thousand on the Pacific Coast could afford to do so.

In *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 109, 110, 23 S. C. T. 33; 47 L. Ed. 90, it was held that where it is alleged that the Postmaster General made a postal fraud order without sufficient supporting facts that the complaint states facts establishing the order as void and *made beyond the authority conferred by the Acts of Congress.* Though no court appears to so concede, the decision appears to directly uphold the propriety and jurisdiction of a suit against a local postmaster. This court stated:

> "* * * irreparable injury will be done to these complainants by the mistaken act of the Postmaster General in directing the defendant to retain and refuse to deliver letters addressed to them. The Postmaster General's order being the result of a mistaken view of the law could not operate as a defense to this action on the part of the defendant (a local postmaster), though it might justify his obedience thereto until some action of the court. In such a case, as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts) [Referring to said Title 39, Sections 259 and 732.] and therefore it was his duty upon complaint being made to decide the question of law whether the case stated was within the statute, yet such decision being a legal error does not bind the courts."

The existing conflicts are recognized in *National Conference on Legalizing Lotteries, Inc. v. Goldman* (Second Circuit, 1936), 95 Fed. (2d) 66, 67, in which Judge

Learned Hand cites the aforesaid decisions and others and states that *"The Ninth (Circuit) has decided the point both ways."* He further states:

> "How far these decisions are to be generalized is not yet clear, and it is not very likely to become so *while the grounds remain so vague.* * * * So the matter stands on authority; it must be owned that the law is not as clear as one might wish. * * * Officials are frequently bothered by contrary rules of inferior federal courts and can hardly be expected to accept a single one, even if they stand uncontradicted, *and they may reasonably not give up their views until the final authority has spoken.*" (Emphasis added.)

By the decision in the instant case it would appear that this important question is now left in still greater confusion.

(b) This Question Involves an Important Question of Federal Law Which Has Not Been, But Should be Settled by This Court.

It appears not to be conceded in any of the decisions that this question has been settled by this court. In any event, it appears that neither this court nor any court has had occasion to settle the question upon the real grounds upon which it would appear the decision should be based.

In *Rood v. Goodman, supra,* at page 31, the court states:

> "The defect of want of parties does not go to the jurisdiction of the court to entertain it; it goes to its discretion as a court of equity to entertain it."

What equities exist in favor of the citizen, that is, the manner in which a postal fraud order is made, its serious

consequences, and the complete absence of any reason or necessity for compelling a suit to prevent the execution of such an order to be brought only against the Postmaster General at Washington, D. C. seem never to have been considered.

Recent decisions indicate that the postal department now makes a regular practice of moving to dismiss all of these postal fraud cases upon the sole ground that the Postmaster General must be made a party defendant. (*Ernest v. Fleissner,* 38 Fed. Supp. 326; *Scientific Mfg. Co. v. Walker,* 40 Fed. Supp. 465.) Where such a motion is granted the plaintiff is of course obliged to bring a new action in the District of Columbia. Here, the fraud order has been made against an individual person, as distinguished from a firm or corporation [R. 23]. In the case of an individual living on the Pacific coast (as here), or in Hawaii, or Alaska, probably not one in one thousand could afford to prosecute an action against the government in Washington, D. C. Therefore, in practically every instance, when the motion to dismiss is granted, a person finds himself helpless to further resist a postal fraud order, however unfounded or unjust it may be.

This court has held:

> "The opportunity to defend must not be merely colorable or illusory." (*Polko v. State of Connecticut,* 302 U. S. 319, 82 L. Ed. 288, 55 S. Ct. 149.)

Yet there is not any proper or sensible reason why these cases should be brought in the District of Columbia, or why the Postmaster General should be a party. It would seem that he is unlikely to be aware even of the existence of any particular case. As alleged in the com-

plaint, he signs these fraud orders merely as a matter of routine upon the recommendation of his subordinates [R. 11]. Certainly the Postmaster General does not assist in defending any of these cases, and he undoubtedly never is a witness. He knows nothing of the facts. The transfer of these cases to Washington is therefore not even for his personal convenience. If the convenience of his subordinates must be suited then he can appoint a subordinate as easily in California as in the District of Columbia.

Furthermore, these cases are generally tried by the district courts upon the record which was made at the hearing before the Department. Upon that record they can be tried just as readily in one district as another. Such an order is not even for the convenience of witnesses. If witnesses were permitted to testify they would more than likely all come from the place where the offense is asserted to have been committed.

Also, from the standpoint of convenience of the government, or of the government's attorneys (if such an element could be properly taken into consideration) the government can just as readily provide competent attorneys in the Southern District of California as in the District of Columbia. It had such attorneys in court for the purpose of making the motion to dismiss.

It is the local postmaster who is the real and necessary party. It is he who is committing the tortious acts complained of and it is against him that the plaintiff needs and is entitled to injunctive relief. As pointed out in *Bailey Gaunce Oil Co. v. Duncan*, 10 Fed. Supp. 280, one seeks to enjoin a sheriff from carrying out a void order, not the court which issued it.

From the foregoing it would appear as an inevitable conclusion that the only possible purpose for the government's motion to dismiss is to accomplish the only result which it generally does accomplish—to prevent the plaintiff from resisting or questioning the Postmaster General's order at all.

In this instance it would have accomplished just that if petitioner's attorneys had not chosen to personally meet substantially the entire expense of these proceedings.

Our forefathers fought the Revolutionary War to prevent just this sort of oppression.

> "He (the King) has called together legislative bodies at places unusual, uncomfortable, and distant * * * for the sole purpose of fatiguing them into compliance with his measures."

It is an astonishing fact that no court seems to have been called upon to consider that a postal fraud order requires all mail of every character, personal or otherwise, to be returned to the senders and that this is equivalent to branding a person under the seal of the United States government. A person might just as well be required to carry around his neck a sign reading:

> "This man has been found guilty of fraud by the United States government."

Such an order requires a still more severe form of branding. It calls for a form of public degradation from which the person branded cannot escape even by remaining indoors. Wherever he lives for the balance of his life, or so long as the Postmaster General may see fit, someone will inevitably send him a personal letter, a bill, or an advertisement, all of which will be subject to the order.

It would seem well nigh impossible for a person to earn an honest living under such a handicap. It is a punishment, the payment of which he can never complete. Even after he dies communications will be sent to his name as listed in a directory and they will all be returned stamped "Fraudulent" to impugn his memory.

It is a cause for alarm that such an un-American procedure should have been ignored for fifty years. It involves a worse form of cruelty than branding on the face or hand. Yet, Blackstone especially frowned upon "branding on the face or hand" in 1753 (4 Blackstone 376), and it is said that the delegates to the convention "had Blackstone's statement largely in mind" in framing the Eighth Amendment. (*Davis v. Berry,* 216 Fed. 413.)

Such a branding deprives a person of his most precious liberty,—his Sacred Honor. Our forefathers, in signing the Constitution, placed their "Sacred Honor" on an equality with their property—and their lives.

In *Neafie v. Hoboken Printing Co.*, 75 N. J. L. 564, 60 A. 146, it is stated:

> "The right of a person to be secure in his reputation * * * is a part of the right of enjoying life and pursuing and obtaining the safety and happiness which is guaranteed by our fundamental law."

As stated in *Myers v. Nebraska*, 262 U. S. 390:

> "Liberty denotes not merely freedom from bodily restraint, but also the right * * * generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free man."

It would appear that such an order calls for a punishment which is unquestionably greater than that permitted in a criminal case. If a criminal court should impose such a punishment a storm of protest would doubtless arise throughout the land.

Such a punishment is out of all proportion to the offense asserted to have been committed. Here, two hundred people have been each sending petitioner the sum of one dollar a month. None has any complaint [R. 31]. Only the California State Medical Board complains and seeks to prevent these few people from patronizing the plaintiff [R. 31].

What Mr. Justice Holmes and what Mr. Justice Brandeis thought of these orders is expressed in their dissenting opinion in *Leach v. Carlile*, 258 U. S. 138, 141, 66 L. Ed. 511, 42 S. Ct. 227, as follows:

> "The statute under which fraud orders are issued by the Postmaster General has been decided or said to be valid so many times that it may be too late to expect a contrary decision. But there are considerations against it that seem to me never to have been fully weighed * * *.
>
> "* * * We have not before us any question as to how far Congress may go for the safety of the nation. The question is only whether it may make possible irreparable wrongs and the ruin of a business in the hope of preventing some cases of a private wrong that generally is accomplished without the aid of the mail. Usually private swindling does not depend upon the postoffice. If *the execution* of this law does not abridge freedom of speech, I do not quite see what could be said to do so * * *." (Emphasis added.)

The Congress which passed the fraud order statute in 1890 is the same Congress which refused to adopt the first Pure Food and Drug Act, the only possible justification for which refusal being that it hesitated to deprive persons of profit who might wish to sell impure foods to the public. This same Congress in adopting this statute apparently never stopped to consider that it could have provided the Post Office Department with a much more satisfactory and effective remedy if it had authorized it to enjoin fraudulent use of the mail through application to the District Court in the asserted offender's district of residence. It would thereby have avoided the necessity for summary orders made by the Department itself, the useless branding of American citizens for life, and the cutting off of the right of every person in the United States to communicate by mail with every person against whom a fraud order is made. It seems unbelievable to petitioner that this country would tolerate the existence of this statute. Yet, this court refused in December, 1941, to consider the question of the unconstitutionality of this statute in *Ex parte Acret, supra.*

In any event, in view of the doubtful constitutionality of this statute, and of the severity of the penalty inflicted and of the manner in which a fraud order is made, it would seem that a court of equity should permit a person affected, complaining as a suppliant at its doors, to have a full hearing on the merits up to the extreme limit of its jurisdiction.

It would seem that, aside from these equities, the real reason why respondent can be sued in the district of his residence, without the necessity of joining the Postmaster General, is that any person has the right to prevent anyone, including a local postmaster, from violating his personal liberties or property rights. The possession of a void order furnishes no ground for immunity. A subordinate government official is no more immune from suit than would be petitioner's stenographer if she should break a store window under petitioner's order.

As pointed out in *Teal v. Felton*, 12 Howard 284:

> "It is the law which gives jurisdiction (for postal regulations and orders) and nothing less than the law can give irresponsibility to the officer (the local postmaster), although he may be acting in good faith under instructions from his superior * * *. Here the instructions exceed the law" (as here).

To require such a suit to be brought in the District of Columbia instead of in the district where the void order is sought to be enforced is not in accord with the spirit of Rules 1 and 4(4) of the Federal Rules of Civil Procedure. It is not a means of effecting a "just, speedy and inexpensive determination" of an "action attacking the validity of an order of an officer or agency of the United States not made a party."

No court appears to have been called upon to give this question consideration from these viewpoints.

POINT II.

The Department Cannot Make a Postal Fraud Order by Way of Punishment for a Circular Asserted to Have Been Used Through the Mail in the Past and the Use of Which Has Been Discontinued and Which Has No Connection With the Present Business of Petitioner.

This is a question which is subordinate to an appeal to this court's discretion but which has not been but should be decided by this court.

As established by the findings of fact the circular concerning the Cosmic Rectifier had not been used by anyone for a period of nearly three years [R. 43].

The authority of the Postmaster General extends no further than that expressly given him by the statute. The statute authorizes him to make a fraud order only against any person who IS engaged in the conduct of any scheme for obtaining money by fraudulent pretenses, etc. [R. 9]. The charges which the Postmaster General made were with reference to a writing which the plaintiff was THEN circulating [R. 15 and 39]. Also, the fraud order, upon its face, purports only to relate to, and to be based upon, a fraudulent scheme in which the plaintiff was THEN engaged [R. 23].

Yet, as part of its Findings of Fact, the Department sets forth the contents of this discontinued circular as partial support of its order, all without any proof or finding that this circular was in any way related to the business in which petitioner was then engaged and where the circular upon its face shows that it is in no way related [R. 41]. The Circuit Court quotes from this circular at length and states that it "bristles with the indicia of deception and fraud", and holds it up as justification for petitioner having been held guilty [R. 100].

POINT III.

The Complaint States a Cause of Action and by Refusing to Grant a Hearing in Some District Upon the Merits, Both Upon the Factual Allegations and Upon the Constitutional and Other Law Questions Presented, the Lower Courts Have so Far Departed From the Accepted Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision.

From the Statement of Facts, *supra,* it would appear that the circular concerning the Cosmic Generator [R. 43], being the circular then being used and obviously the writing referred to in the charges, is the writing which must support the order if the order is to be considered as supported at all. An examination of this circular [R. 43 to 50] would indicate that it is innocuous, and that though it may seem to a rational mind to be extremely silly it does not contain representations which may be construed as that character of fraud which is sufficient to invoke the severe penalty imposed by this statute.

As stated in the *McAnnulty* case, *supra:*

> "* * * these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis" p. 104).

The situation is somewhat similar to that in *Harley v. Dolan,* 297 Fed. 825, which involved the sale of lucky stones, and in which the Post Office Department had made charges, "in effect" (as here) and had attempted to rely

upon a circular the use of which had been discontinued (as here). In that case the court stated:

> "The District Court finds that: 'A comparison of the Rand circular and the Dolan circular shows that these findings are erroneous; . . . that none of the false representations which were contained in Rand's circulars and formed the basis of the criminal prosecution and fraud order against him are made by the complainant; . . . that no false statement or representation is made by the complainant in her advertising; that the testimonials appear to be genuine; that *the Dolan circular is designed to sell lucky stones, and does so without falsehood or misrepresentation; that there is nothing immoral in the belief that gems or amulets affect the wearer's fortunes;* that if the complainant wishes to sell lucky stones for what they are, without lying about them, she is not acting fraudulently in so doing.'
>
> "We think the facts set out in the agreed statement show that the conclusion reached by the Postmaster General was clearly wrong and that the decree of the District Court should be sustained. *The difficulty with the conclusion of the Postmaster General was due to the erroneous statements* (as in the instant case) *contained in the memorandum of the solicitor as to the contents of the complainant's circulars . . .*" (stated "in effect," as here.) (p. 826.) (Emphasis added.)

Considering petitioner's circular in its worst possible aspect, and ignoring all of the allegations of his complaint, the words of the *Dolan* case may be appropriately paraphrased here:

> The latest circular is designed to sell prayer cards and does so without falsehood or misrepresentations;

there is nothing immoral in the belief that prayer cards are beneficial to the subscriber's health.

In other words, there does not exist that "fraud in fact" which was held essential in the *McAnnulty* case. The circular contains no fraudulent representations at all.

Here, the plaintiff alleges in addition affirmative facts establishing that his business is conducted upon a fair and honest basis. It happens that the allegations of plaintiff's complaint at R. 31 are almost identical with allegations held sufficient in the *McAnnulty* case. In that case, this court, at pages 101 and 103, stated with reference to such identical allegations:

"These allegations are not conclusions of law, but are statements of fact upon which, as averred, the business of the complainants is based, and the question is whether the complainants who are conducting the business upon the basis stated thereby obtain money and property through the mails by means of false or fraudulent pretenses, representations or promises. Can such a business be properly pronounced a fraud within the statutes of the United States?" (p. 103.)

"* * * The bill in this case (as in the instant case) avers that those who have business with complainants are satisfied with their method of treatment and are entirely willing that the money they sent should be delivered to the complainants. (*As here.*)

* * * * * * * *

"That the complainants had a hearing before the Postmaster General, and that his decision was made after such hearing, cannot affect the case. The allegations in the bill as to the nature of the claim of

complainants and upon what it is founded, is admitted by the demurrer, and we therefore have undisputed and admitted facts which show upon what basis the treatment by complainants rests, and what is the nature and character of their business. From these admitted facts it is obvious that complainants, in conducting their business, so far as this record shows, do not violate the laws of Congress. The statutes do not, as matter of law, cover the facts herein." (p. 107.)

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld." (109-110.)

As stated in the case of *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 52; 80 L. Ed. 1033; 56 S. Ct. 720:

"Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may

be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. * * *"

In interpreting the above quoted opinion the California Supreme Court in *Drummey v. State Board of Funeral Directors,* 13 Cal. (2d) 75, 85; 87 Pac. (2d) 848, stated:

> "In view of these principles, it necessarily follows that the court to which the application for mandate is made * * * must exercise an independent judgment on the facts."

It would seem worthy of consideration that here and in the *McAnnulty* case the plaintiff alleged all that it was possible for an innocent person to allege concerning the invalidity of a postal fraud order. There is no provision in the statute allowing a person the right of appeal or requiring the Post Office Department to furnish a person affected with a copy of the proceedings, or even giving him the right to obtain one, and where as here, he did not or could not attend the hearing he is helpless to allege facts other than the ultimate facts concerning his innocence of the charges made. Ordinarily the Findings of Fact, though unsupported by any evidence, would doubtless not appear to be insufficient. It is probably an exceptional case where the findings, as here, establish upon their face that the order is unsupported by evidence.

It would seem especially worthy of note that other agencies, such as the Federal Trade Commission and the Labor Relations Board, the enforcement of the orders of which are of much greater importance to the nation, have not the power to make their orders effective except under the control of a Circuit Court of Appeals. Yet it will doubtless be conceded that these administrative agencies are much better organized and equipped to conduct impartial hearings than the Post Office Department.

In view of the severe penalty involved and of the summary manner in which postal fraud orders are made, it would seem that all persons affected should be held entitled to a trial *de novo* in the district of residence of the local postmaster and that a complaint alleging innocence of the charges made should be held sufficient to invoke the jurisdiction of the court.

It would seem that the complaint states a cause of action and that in violation of Anglo-American rules of procedure and due process this petitioner has been deprived of his day in court.

POINT IV.

The Form of the Order and the Manner in Which It Was Made Is in Violation of Petitioner's Constitutional Rights, Because: (a) An Administrative Agency Cannot Inflict a Punishment Such as Has Been Inflicted Here, and (b) Nor Can It Take a Portion of a Person's Liberty—as Distinguished From His Property—and Inflict Such a Punishment, in the Manner Done Here, to-Wit, at a Hearing Held Three Thousand Miles From His Place of Residence, Without the Presumption of Innocence, the Right to a Jury Trial Before an Impartial Judicial Tribunal, and the Protection of His Other Civil Rights Guaranteed by the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States.

With the court's permission, if and when the within petition is granted, petitioner will file a supplemental brief in support of this point.

From the foregoing it would appear that the questions involved are of sufficient importance to justify consideration by this court.

Respectfully submitted,

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